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LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 3205
Boston, MA 02210
(617)345-6787

A P P E A R A N C E S:

For the Plaintiffs:

STEVE W. BERMAN, ESQ. (By Telephone),
Hagens Berman Sobol Shapiro LLP, 1301 5th Avenue, Suite 2900,
Seattle, Washington, 98101-1090.

THOMAS M. SOBOL, ESQ., Hagens Berman Sobol Shapiro LLP,
One Main Street, Cambridge, Massachusetts, 02142.

DONALD E. HAVILAND, ESQ., The Haviland Law Firm, LLC,
740 S. Third Street, Third Floor, Philadelphia, Pennsylvania,
19102.

ALSO PRESENT: Andrew J. Jackson, Esq., D. Scott Wise, Esq.

P R O C E E D I N G S

THE CLERK: In Re: Pharmaceutical Industry Average Wholesale Price Litigation, Civil Action 01-12257, will now be heard before this Court. Will counsel please identify themselves for the record.

MR. SOBOL: Good morning, your Honor. Thomas Sobol for the class plaintiffs. With me on the phone is my partner, Steven Berman.

THE COURT: Thank you.

MR. HAVILAND: Good morning, your Honor. Donald Haviland, Haviland Law Firm, for the plaintiffs.

THE COURT: I'm not sure if any defense counsel have shown up. They're not needed. I notice some folks who might be defense counsel sitting here. Do you want to be recognized or just sit and --

MR. WISE: I'm just observing, your Honor.

THE COURT: Just observing, that's fine.

I got a phone call from a Judge William G. Bassler after I had appointed Mr. Haviland as co-lead counsel, basically based on a settlement among the lead counsel team. There had been a serious dispute on the plaintiffs' team. I thought it was serious. I was about to enter into the fray when you worked it out, and although I had some misgivings, I simply said, "If you agree, I'll agree."

The call from Judge Bassler prompted him sending me

1 a copy of a letter that you sent to him, Mr. Haviland, on
2 July 27, 2007. I didn't know if Mr. Sobol had seen that or
3 Mr. Berman.

4 MR. SOBOL: I have not, your Honor. I don't know
5 if Mr. Berman has.

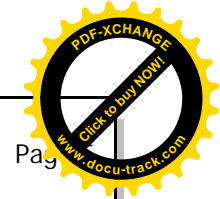
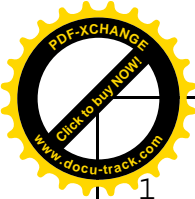
6 MR. BERMAN: I have not seen it, your Honor.

7 THE COURT: There were two things that worried me,
8 but let me get quickly to the thing that worried me the most,
9 which is, you're seeking a national class in the AWP in the
10 state litigation, at least according to this letter. Is that
11 still true?

12 MR. HAVILAND: Well, your Honor, that's a great
13 question, and let me just say that at the outset, there has
14 never been any effort to overlap or interfere with this
15 Court's jurisdiction. You have to remember the history. We
16 were brought in as Kline & Specter at the time to assist the
17 Local 68 counsel in the summer of 2003. They had filed two
18 cases, the Vioxx litigation and AWP. The client intended to
19 pursue a national class in both cases. Your Honor I know got
20 from defense or actually plaintiffs' counsel the Supreme
21 Court's decision in Vioxx, which is directly involving that
22 plaintiff, and that certainly is informing that client's
23 intentions in New Jersey.

24 THE COURT: Can you hear, Mr. Berman?

25 MR. BERMAN: It's very hard to hear.



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1 MR. HAVILAND: I'm sorry, I'll speak up.

2 THE COURT: That may not be on, the mike, and I
3 need you to hear this.

4 MR. HAVILAND: So the answer to your question, your
5 Honor, is it's unclear, simply because the original complaint
6 filed in 2003 against 56 companies sought a nationwide class
7 action. Since that time, your Honor has certified a
8 nationwide class action, at least for consumers. You're
9 considering the same for Track Two. So today I can tell you
10 that we're not looking to do anything that would overlap or
11 interfere with that. By the same token, there are some
12 defendants that are not in the MDL. And so what we were
13 asked to respond to for Judge Bassler, who, by the way, has
14 been appointed special master by the state court judge, and
15 we asked him, your Honor, to contact you so that we could
16 coordinate to make sure that there was --

17 THE COURT: It just says in this July 27, 2007
18 letter, "On the strength of the recent Vioxx decision
19 involving the same representative plaintiff," which I assume
20 is International Union of Operating Engineers, "plaintiff
21 seeks certification of a nationwide class defined as
22 follows." Now, this is just a month ago.

23 MR. HAVILAND: Right.

24 THE COURT: "-- defined as follows: All persons
25 and entities in New Jersey and throughout the country," and

1 then it talks, "paid beginning at least 1991 through the
2 present any cost of a cancer, inhalant, and miscellaneous
3 other drugs manufactured, marketed, distributed and sold by
4 defendants." Now, I don't know exactly who all the
5 defendants are in that case.

6 MR. HAVILAND: There are 56, and, your Honor --

7 THE COURT: Fifty-six, so I'm assuming there's a
8 big overlap here, right?

9 MR. HAVILAND: Big, yes, in the sense of 20 some
10 defendants.

11 THE COURT: Okay, so --

12 MR. HAVILAND: That language comes right out of the
13 complaint, just so you know, your Honor. We were asked by
14 Judge Bassler to give him what the class as pled was.

15 THE COURT: As you remember, maybe not, when I
16 remanded the case, I was enormously concerned because of a
17 lack of reasonable research as to whether these doctors all
18 had consented to the removal. However, there were direct
19 representations made to me that it was only going to be a
20 New Jersey class. And I haven't looked up the Consumer Class
21 Action Fairness Act in a while. I don't even know whether or
22 not your proposed national class action is still viable
23 through a state system, but, in any event, it's directly
24 inconsistent with your obligations to this Court.

25 MR. HAVILAND: Well, and, first of all, your Honor,

1 Mr. Sullivan spoke that day. In his prefatory comments, I
2 wasn't aware of his saying those things. They were
3 inconsistent with the complaint, but he said that there were
4 state claims, state-specific, and there were no federal --

5 THE COURT: Who's Sullivan?

6 MR. HAVILAND: He's the associate who appeared that
7 day from Keefe Bartels, from the firm that represents
8 Local 68 directly in both Vioxx and the AWP case.

9 THE COURT: Well, regardless, it was
10 representations made to me.

11 MR. HAVILAND: No question.

12 THE COURT: I was concerned that there wasn't a
13 reasonable investigation as to consent or not consent. I
14 remanded. A very experienced senior federal judge is
15 actually helping, as I understand it, the state court and
16 handled the thing. And as we do, actually, behind the
17 scenes, we pick up the phone to each other, and it was
18 literally by serendipity a day after I had appointed you as
19 co-lead counsel.

20 MR. HAVILAND: Right.

21 THE COURT: Or two days after, something like
22 that. And so I need to know that you're not seeking
23 something that, A, is inconsistent with your ethical
24 responsibilities to this Court, and, B, that would defeat my
25 jurisdiction as MDL judge.

1 MR. HAVILAND: Neither do I, your Honor, and I
2 understood from your clerk when I got the phone call about
3 today, I'm coming today to tell you that's not going to
4 happen. Again, the history: This case got remanded. It's
5 finally gotten with a special master appointed. We
6 encouraged Judge Bassler to call you so that we could make
7 sure that we knew exactly what your Honor was doing as that
8 case progressed. So, you know, the schedule has the case
9 going through 2010. We are going to wait to see what
10 happens. I think we have class next summer. Mr. Jackson is
11 here for Baxter, who's liaison counsel in the New Jersey
12 case. So we don't even have briefing until well down the
13 road.

14 THE COURT: Yes, but this cannot -- you made a
15 specific representation to the court you were seeking a
16 national class action. Somebody else but on behalf of the
17 same party made a specific representation to me that it was
18 only a state case. But even putting aside all of that, I
19 think you wanted to be co-lead counsel here, and you had not
20 been appointed until that point.

21 MR. HAVILAND: Well, Kline & Specter had, and
22 that's right, your Honor, my law firm had not, and I agree
23 with that.

24 THE COURT: So you can't do this.

25 MR. HAVILAND: Well, we can't seek a nationwide

1 class where it's overlapping. I absolutely agree with that,
2 your Honor.

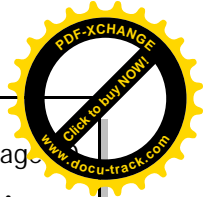
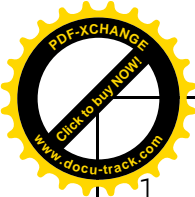
3 THE COURT: So should I issue an injunction? I
4 mean, I don't know if Mr. Sobol and Mr. Berman or Mr. Wise,
5 who's sitting here now on behalf of AstraZeneca, or the folks
6 from Baxter knew about this, but I must admit, red flags
7 popped up all over the place for me.

8 Mr. Sobol?

9 MR. BERMAN: Your Honor, if I may say one thing,
10 and then I'll let Mr. Sobol speak. We didn't really know
11 that this was happening until after this hearing was set and
12 we began to investigate this, but I'm looking at the
13 transcript of the proceeding before the special master where
14 Mr. Haviland has appeared with his cocounsel, Mr. Williams,
15 in the case, and the special master asked at Page 27,
16 "I guess we've answered the question. It's the plaintiffs'
17 position that they want a nationwide class?" Answered by
18 Mr. Williams, "Yes, your Honor."

19 So on August 5, I think after Mr. Haviland was
20 appointed lead counsel before your Honor, he and his co-lead
21 counsel were taking the position in the New Jersey court that
22 they were seeking a national class.

23 THE COURT: Well, what do I do with this? I mean,
24 I -- let me just say, the second thing that's created some
25 misgivings for me was a statement that I had appointed you



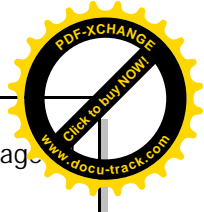
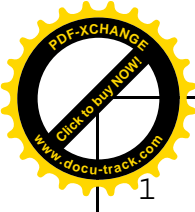
1 co-lead counsel as of July 27, 2007, which was not the case.

2 Now, that, you could argue, was subsequently cured with the
3 settlement, but at the time, of course, it was a huge pissing
4 battle -- excuse my French -- within the plaintiffs. So I
5 hadn't appointed you co-lead. That was the very issue that
6 was pending. So I'm just worried -- this is a worried
7 conference call -- about whether you are, A, candid with the
8 New Jersey court and with me, and, B, what do I do about
9 this?

10 MR. HAVILAND: Well, if I could answer the what you
11 do about it, we have Judge Bassler speaking to your Honor for
12 the very purpose so that there isn't a problem, okay? It's
13 not going to be addressed until sometime next summer when we
14 file a class. There are a host of defendants that are in
15 this MDL. Now, your Honor has ordered mediation, and that
16 may come to fruition. There are 19 some attorneys general
17 pursuing those other companies, Hoffmann-La Roche, for
18 instance. Local 68 intended when it filed the case in Vioxx
19 and AWP to have a national class on the strength of that
20 Vioxx case. The Supreme Court has now ruled that that's a
21 question. Co-lead counsel here have said --

22 THE COURT: The Supreme Court of New Jersey or
23 Supreme Court of the United States?

24 MR. HAVILAND: New Jersey. That's the opinion that
25 co-lead counsel sent to you, I think this week, explaining



1 that we don't believe that that affects your decision here
2 for the TPP class.

3 THE COURT: You know, I know you'd like to think
4 that I'm totally current on all 5,000 docket entries, but I
5 don't remember seeing that yet, and maybe I will, but right
6 now I need a representation from you.

7 MR. HAVILAND: Yes.

8 THE COURT: I don't like to enjoin state courts.
9 A, I think the case law is muddy on whether I can do it --
10 that's a difficult area -- but as a matter of policy, I
11 prefer to work together with the state courts, so --

12 MR. HAVILAND: And we could craft a stipulation to
13 that effect, your Honor. It's never been raised until this
14 moment --

15 THE COURT: You need this to drop all allegations.
16 Now, I don't know who, like, the lead counsel is for
17 defendants there. Are you Baxter? Are you lead down there?

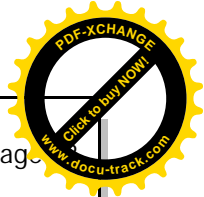
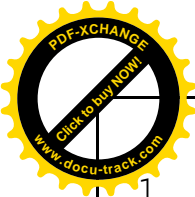
18 MR. JACKSON: I'm lead liaison counsel, your Honor,
19 Andy Jackson.

20 THE COURT: Well, so I know you don't want to be
21 here, but you are. So can you think of any reason why, if he
22 filed a stipulation of dismissal with respect to the request
23 for a national class action on all the companies that are
24 involved in the MDL, that that would create any kind of a
25 problem?

1 MR. JACKSON: Let me back up a little bit just to
2 make sure that you have the record clear, your Honor. There
3 wasn't just the statement in front of you that you referred
4 to earlier about the New Jersey matter being in New Jersey.
5 There was a letter written to you as well by Mr. Keefe in
6 September, I guess it was 10th, the day before your argument
7 on the New Jersey remand motion, where they in that letter
8 made a very direct representation that the New Jersey matter
9 was a state class only, and then the next day in the hearing
10 here, they made the same representation. So we've thought
11 until that time that the New Jersey matter, we have lots of
12 problems with it, lots of class problems, lots of merit
13 problems, but at least based upon that and your actions, we
14 thought that that was a New Jersey class.

15 Now, the issue you raised about a stipulation for
16 our client, that would be great. Since the other defendants
17 who are not here or who don't have overlapping MDL versus
18 New Jersey matters, we have to look at what the stipulation
19 would look like. We'd get it to all our defense counsel.

20 THE COURT: Well, here's my problem: I don't have
21 jurisdiction over any claims or defendants which do not exist
22 in the MDL. Now, it may be that you could make an allegation
23 that it's either judicial estoppel or law of the case or
24 fraud, I mean, whatever you would want to say that would
25 somehow bring that case back up here, which I'm not looking

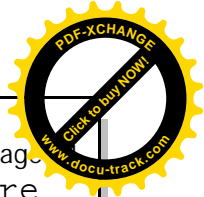
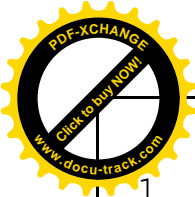


1 forward to, but I can't do anything with that. That has to
2 be handled totally through the New Jersey action, it strikes
3 me; in other words, either an additional notice of removal or
4 some sort of a request to dismiss for unethical conduct.
5 That's in your -- I don't have it. I can't do anything. But
6 on my case on my watch and my hunt, I do have jurisdiction;
7 and I believe I have the power to protect the authority, the
8 jurisdiction of this Court by enjoining the Haviland firm and
9 his party from pursuing a national class action with respect
10 to any overlapping claims and defendants. I could do that,
11 or he could simply drop them expressly before the Court.

12 And I don't know -- this is may be the first time
13 that Mr. Sobol or Mr. Berman have seen this -- I don't know
14 if it affects their agreement to have him be part of the
15 class team if you didn't even know about this.

16 MR. SOBOL: Well, let me address a few things, your
17 Honor, take a couple of steps back to make sure we put this
18 in context because I think you want to make sure you know
19 what it is that people knew or were aware of.

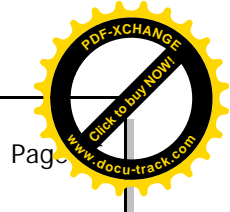
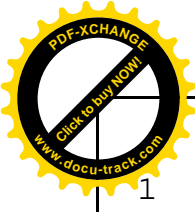
20 In August of 2007, at the end of August when we
21 came before you and we worked out the resolution with
22 Mr. Haviland, the only thing that we knew was that there had
23 been a case that had been remanded back to New Jersey, to
24 which there had been a representation to the Court that it
25 was going to be a New-Jersey-only action. Our assumption,



1 meaning the co-leads' assumption, would be that if there were
2 actions that were going to be taken in New Jersey, that
3 Mr. Haviland would confer with us prior to taking them so
4 that we would make sure that that was coordinated with what
5 we were doing, and that's essentially, as I understand it,
6 all we knew.

7 As Mr. Berman indicated when we got notice of this
8 hearing, we then looked into what the circumstances were for
9 why it is that the Court wanted this, and we learned
10 essentially the things that have been indicated here: First,
11 to our surprise, there was a representation made down in
12 New Jersey that the New Jersey action would go forward on a
13 nationwide basis rather than a New-Jersey-only-wide basis,
14 and that's something that had not been reviewed by us. And
15 obviously that's something that, you know, would be an issue
16 of concern.

17 Second, it was at least a little bit ironic to us
18 that although the class counsel here in Boston had been --
19 there were disparaging remarks made about us because we were
20 representing both third-party payors and consumers in the AWP
21 case by Mr. Haviland, and yet that's exactly what's also
22 being done, or at least Mr. Haviland is representing TPPs and
23 consumers, or at least TPPs in the New Jersey action, and
24 that was a concern to us. And there were a variety of other
25 things that we sort of looked at that gave us pause.

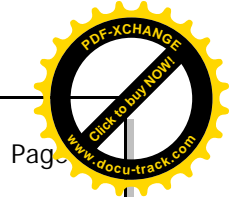
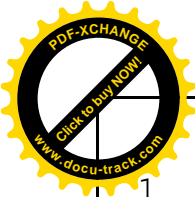


1 Now, where did that leave us? Well, where it
2 really leaves us is that we're in a position where our
3 overall view is, we want to be representing the class, and we
4 want to be representing the class effectively. And so we're
5 willing to continue to work with Mr. Haviland if that's what
6 the Court thinks is appropriate. On the other hand, if the
7 Court does not think that that's appropriate, then we're
8 willing to step down from doing that, but --

9 THE COURT: Well --

10 MR. SOBOL: Let me -- I want to go into the balance
11 of it so you can hear about the overall. It's also just as
12 important to understand that, I don't know, but at least in
13 theory, there might be defendants in the New Jersey action
14 that are not defendants here in the AWP MDL, or there might
15 be drugs in New Jersey that are at issue that are not at
16 issue here in the MDL. And to that extent, then there
17 wouldn't be any overlapping, okay? But it's not enough
18 simply to say, go forward only on a New-Jersey-wide basis
19 because there would still be a need for coordination if, A,
20 the New Jersey action has some of the same defendants and
21 drugs and it's doing the New Jersey piece. That would be an
22 issue for us, and we would need to make sure that we have,
23 you know, coordination with what was going on down there, at
24 a minimum, and communication.

25 THE COURT: Well, the judge was fabulous. I mean,



1 he and I are definitely talking.

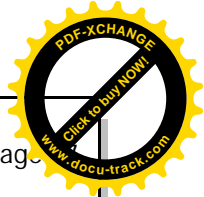
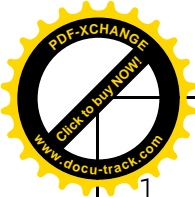
2 MR. SOBOL: Right.

3 THE COURT: So, I mean, in that sense, I think just
4 as in the Neurontin case, I'm working with Judge Freedman and
5 the state courts of New York, I mean, I'm willing to
6 coordinate and work. In fact, I think it's fabulous that he
7 picked up the phone because I didn't even know about this
8 issue. I wouldn't have known about it.

9 MR. SOBOL: Right, but if I may --

10 THE COURT: So if that's what Mr. Haviland is
11 urging, well, then that's a feather in his cap. But let me
12 just say this: I've got a problem, Mr. Haviland. Let me
13 just be really blunt. I knew about the problems you had with
14 Judge Stearns. I knew. I read about it. I know about it.
15 I've talked with Judge Stearns. I knew. Strike one.

16 Strike two, I had problems with getting the Friday
17 before the hearing all the affidavits from class reps in a
18 case that had been going on for six years that would pull the
19 plug on a case that wasn't just about those class reps; you
20 know, people who are sick and with cancer who might not be
21 able to have a proceeding, or if I ruled against them, they
22 could appeal; if I ruled for them, they got money. But it
23 was just after six years just, you know, "I'm going to take
24 my toys and go home if I don't get it my way." So but I was
25 willing to go with the settlement. But then when I see this,



1 it's like the third strike kind of thing, and I'm just -- I
2 have to make sure that someone's going to have the utmost
3 duty and loyalty to the class.

4 MR. HAVILAND: My problem, your Honor, is, when I
5 was at Kline & Specter, we were engaged by a number of firms
6 to work with them. When Kline & Specter decided to pull out
7 of these cases, we were left with them. So this is a case
8 that I had the responsibility for by a prior arrangement.

9 I want you to see the case management order that's
10 been proposed. Andy Jackson proposed it. We agree with it.
11 It's got coordination under CMO 9 directly. We've always
12 agreed with the defendants that this case should be under the
13 rubric of the MDL, despite the fact it went back to state
14 court.

15 And I know you understand from Judge Stearns what
16 happened there. Lupron was an unfortunate circumstance where
17 cases were filed at the same time and proceeded to trial in
18 state court, and it just so happens that the case got settled
19 up here. And it got worked out with a lot of work by the
20 lawyers and the attorneys general, and it got resolved.

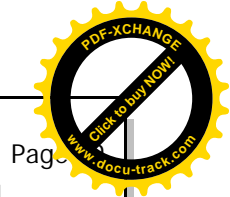
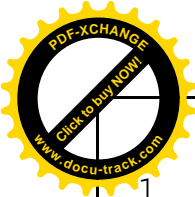
21 And, you know, I won't go back and revisit the fact
22 that there were thousands of folks that were unhappy about
23 that, and we were representing them directly by direct
24 retainer agreements. It's one of the problems you have, as
25 in this case, where I represent a dozen folks directly.

1 Mrs. Howe, for instance, in AstraZeneca -- I see Mr. Wise is
2 in the courtroom -- she paid 50 percent out of pocket, and
3 the settlement doesn't accomplish her issue. So it's still a
4 problem, but we're working together cooperatively. We've had
5 a call about that to try to resolve that.

6 THE COURT: It's just she's not part of the class.
7 It doesn't mean that you can't represent her separately on a
8 separate cause of action. She's just not part of this class
9 because of the common question issue. But putting that
10 aside, I need to trust you. Let's get past all the legal --

11 MR. HAVILAND: Sure, absolutely.

12 THE COURT: I need to trust you, and I keep trying
13 to make sure that if there's a consensus among the
14 plaintiffs' team, well, I'll trust you. But truthfully, at
15 this point, I don't trust you. I mean, that sounds like a
16 very mean thing to say, but, you know, at some point I tell
17 people, "You make your bed, you lie in it." You know, I put
18 aside the Stearns things -- well, okay you started a new
19 chapter -- and then there were all the problems with the
20 mediation in front of Eric Green, and there was, like, just
21 this huge human cry about what happened, and I said, "All
22 right, well, that's contested." And then I got the
23 affidavits from these class reps saying, "I'm going to pull
24 out unless it's me," that makes me worried that you were more
25 concerned about you than you were about the class reps. And



1 then I sealed it, and then I see this, and I feel like you
2 weren't --

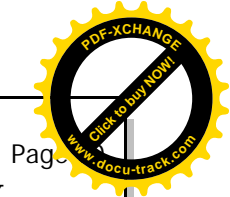
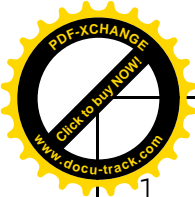
3 MR. HAVILAND: I'm concerned about those clients,
4 your Honor. That's the number one thing.

5 THE COURT: The what?

6 MR. HAVILAND: I'm concerned about those clients.
7 I've always been concerned about those clients. They're the
8 folks represented since 2001 in Lupron and this case. This
9 case is a case that we cocounseled with the Local 68
10 counsel. We encouraged this coordination for the
11 Keefe Bartels firm so that your Honor would know fully about
12 this, as soon as Judge Bassler got appointed with his
13 experience as a federal judge, that he would speak with you
14 and that there wouldn't be a problem. We're trying to avoid
15 that.

16 I think Mr. Jackson will agree, we've worked
17 cooperatively to make sure that we don't have a problem.
18 Nobody wants another Lupron. I certainly don't want another
19 Lupron, your Honor, on my card. I want to see this thing
20 worked out where everyone is brought to the table.

21 One thing we're disagreeing with defendants on is a
22 mediation. Judge Bassler spoke at that conference a long
23 time about mediation. We want the mediation to be here as
24 part of the mediation your Honor has ordered. The defendants
25 didn't agree to that. Their cover letter said, "No, we want



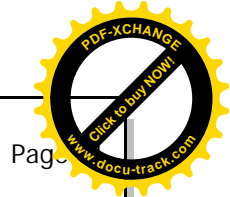
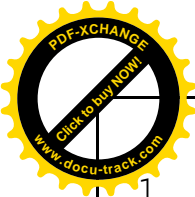
1 something else." So I don't know how that's going to play
2 out. I suspect Judge Bassler is going to go with his
3 instincts and order that it happen here. That's certainly
4 something we encourage.

5 MR. BERMAN: Your Honor, this is Steve Berman.

6 THE COURT: I need some thought from the
7 plaintiffs' team about what makes sense here, and then I need
8 to know from the defense team. Although you don't have a
9 direct role in this, what happens in New Jersey will affect
10 you. The last thing I want to do is to disqualify him if it
11 means that every class rep pulls out, and yet I'm worried
12 here.

13 MR. BERMAN: Let me mention two things on that. If
14 the class reps pull out, which I think he's -- I don't know
15 how he can do that consistent with his obligation to the
16 class, we've done an examination of this; and, unfortunately,
17 because we didn't want it to be this way, we think 99 percent
18 of the class reps that he currently has only bought drugs in
19 2004 or later. And therefore, under your prior rulings, we
20 actually don't have consumer class reps for most of the
21 defendants at this point.

22 The second thing -- and I apologize I didn't point
23 this out earlier -- on the trustworthy issue, when I talked
24 to Professor Green about this, I think I should disclose to
25 the Court that he was very upset. I mean, he said he



1 couldn't call me for two days, he was so angry that
2 Mr. Haviland would file the internal workings, E-mails back
3 and forth of the settlement negotiations with the Court in
4 open court, because one thing you do with Professor Green is,
5 you sign a confidentiality statement that he thinks is like
6 the bible of how you have to conduct settlement
7 negotiations. So he was very upset and concerned that that
8 happened and is trying to figure out, you know, going
9 forward, if Mr. Haviland is one of the co-lead counsel, you
10 know, how could this work.

11 MR. HAVILAND: Your Honor, we sought leave to put
12 that under seal, and we're still asking you. The request for
13 that is still before your Honor.

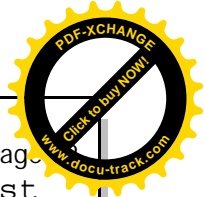
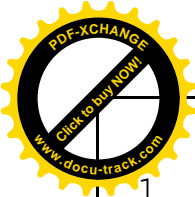
14 THE COURT: When you filed it, did you file it with
15 a motion to seal?

16 MR. HAVILAND: We sent it to your Honor first as
17 your Honor had asked for with a request that it be put under
18 seal, so that if there was --

19 MR. BERMAN: It was filed on the ECF.

20 THE COURT: Was that a mistake in court chambers,
21 or was that a mistake of counsel?

22 MR. HAVILAND: Well, we don't know, your Honor. We
23 first sent it to you when your Honor asked for the
24 declaration, and we asked that it be treated under seal.
25 The ECF picked it up on the Friday before that hearing. We



1 spoke to Robert, Mr. Sobol and I did, about sending a request
2 under seal. I submitted that to Tom --

3 THE COURT: Well, you must know. Did someone on
4 your staff docket it on -- that's the only way it gets there
5 initially. Did someone forget to put it -- did someone send
6 it over the Internet?

7 MR. HAVILAND: I think so, yes.

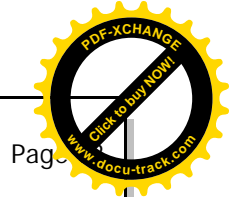
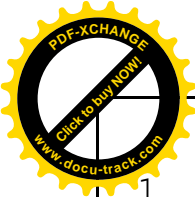
8 THE COURT: All right, so someone in your office
9 made a mistake.

10 MR. HAVILAND: Right, and what we asked for it to
11 be under seal, your Honor, consent for it to be under seal.

12 THE COURT: Well, it's that problem with the
13 Internet. We can pull it off, but once it's there --

14 MR. HAVILAND: Right, that's what we talked to
15 Robert about that day.

16 THE COURT: In any event, I don't know what to do.
17 I must say, as soon as I read it, I wanted to think about it
18 for a few days. I want this. I'm not doing anything
19 precipitously. If anybody in this room wants to file some
20 thoughts for me -- at this point I actually don't even have a
21 pending motion, and yet I do have certain fiduciary
22 obligations as a court. In the meantime, regardless of how
23 this works, I need you to do something about that New Jersey
24 action. They're under the impression, because you said it,
25 that you're pursuing a national class action. Regardless of



1 whether you're co-lead or not, I'm going to enjoin that.

2 That needs to end with respect to the overlap here.

3 MR. HAVILAND: Right. I think your Honor's
4 suggestion to just stipulate to it, we're happy to do that
5 with Mr. Jackson and get the New Jersey court to enter it so
6 that your Honor then has that, which it shows in the record
7 in New Jersey it's not happened. That letter was sent in
8 response to a letter that Mr. Jackson had written asking
9 about the framework for the discussion with Judge Bassler,
10 and we cited, as I said, the complaint, which originally
11 sought the New Jersey class pre the Supreme Court in Vioxx,
12 pre any of this. So --

13 THE COURT: Well, I may be misremembering. I
14 believe that the Hagens Berman Sobol, whatever the whole name
15 of the firm is, filed a memo saying that it was basically
16 beyond dispute right now that you can't certify a state court
17 class action that's national. Something to that effect,
18 right? It was somewhere in one of your briefs, through state
19 court as opposed as through Federal Court.

20 MR. SOBOL: Oh, well, newly filed actions under
21 CAFA.

22 THE COURT: Right.

23 MR. SOBOL: But this is, Operating Engineers, the
24 New Jersey case is pre-CAFA.

25 THE COURT: So it's predating it.

1 MR. SOBOL: Right. If your Honor may, I think that
2 the co-lead counsel -- well, it sounds like Mr. Haviland
3 would like to file something, so can we have a date for that
4 just so you would have a date that you would be expecting to
5 see something from us?

6 THE COURT: A week?

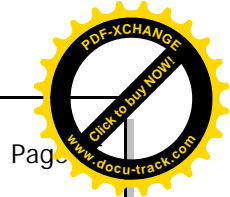
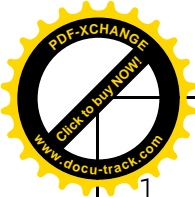
7 MR. SOBOL: Is that doable, Mr. Berman, a week?

8 MR. BERMAN: A week is fine.

9 THE COURT: I don't know if Baxter wants to say
10 anything or AstraZeneca. I don't know. I'm troubled. I
11 actually don't have anything in front of me. I sort of with
12 some misgivings, I guess, agreed to your settlement because
13 of the profound riff that had existed before and what I knew
14 about Judge Stearns's case and my concern about the
15 affidavits coming in that Friday before. I just bit my
16 tongue and I agreed to it on the theory that, well, it was --
17 it was a majority vote? Was that how it worked?

18 MR. SOBOL: Well, that's right, your Honor. And,
19 of course, as you can expect, one of the reasons we entered
20 into the stipulation was to avoid the need for the Court to
21 have to grapple with the issues too.

22 THE COURT: In any event, I agreed to it and I
23 appointed him to it. And then literally within two days I
24 got this phone call, and I have been worried because it is, I
25 think, ultimately my call as to what's going to serve the

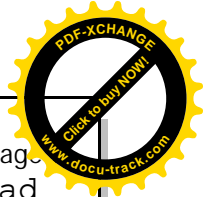
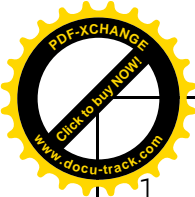


1 best interest of the class, and there's now a trust issue.

2 MR. HAVILAND: Well, your Honor, since the time of
3 that agreement, we had a productive call. We don't want to
4 talk about the logistics of what's going on in the settlement
5 discussions, but it was raised, the issue of the rearview
6 mirror stuff, the BMS and the Astra settlement. And I
7 learned some things that I didn't know from the time that we
8 were taken out of the loop that were encouraging, that could
9 resolve that. And I don't want to say too much about where
10 that's at and where we're working, but we're working
11 cooperatively. A lot of the issues were vetted that they
12 hadn't been before, and that's essentially what we were
13 trying to get to when we reached the agreement with
14 Mr. Sobol.

15 THE COURT: I'm going to take this under
16 advisement. I just need to think about it. I obviously
17 wasn't going to do anything without seeing folks, but, for
18 example, I don't know how you represented to this New Jersey
19 court that you were co-lead counsel when that was so
20 embattled at that point.

21 MR. HAVILAND: Well, your Honor, in fairness, we
22 believed from the time that we came in in August of '05 that
23 all the papers had us listed as co-lead counsel. There never
24 was a dispute until AstraZeneca. That's the point in time
25 when it became a question. Your Honor had -- there was an

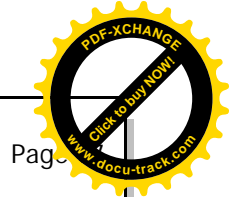
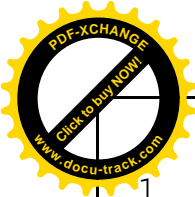


1 entry of appearance for us in September, '05, so we never had
2 cause to question that as the Haviland Law Firm. When we
3 were Kline & Specter, there was never an express appointment
4 there either, so there was always that fifth chair, your
5 Honor, if you will. And so the embattlement came in
6 Track Two when we were talking about interim class counsel
7 becoming class counsel for Track Two, and that was the whole
8 issue of 23(g), not Track One where we had served with GSK
9 and Astra and the Track One defendants.

10 THE COURT: It says, "The undersigned lead counsel
11 for plaintiffs in this action have been recognized by the
12 Boston Court as one of the co-lead counsels for class
13 plaintiffs in MDL 1456."

14 I think a fairer or truer statement would have been
15 that this is -- you've taken the position that you've always
16 been one, the other lead counsel had taken the position that
17 you weren't, and this would be decided by me, right? I mean,
18 I remember you always sitting back there and there not being
19 a battle, but I truthfully don't know the little nuances and
20 the niceties until it was briefed to me between the -- with
21 the split-off from Kline & Specter and your new firms.

22 MR. HAVILAND: And, your Honor, it was all done by
23 a consensus, and none of it was vetted, in fairness. I mean,
24 the original CMO had a firm Heins, Mills & Olson, which is no
25 longer -- they're not even around anymore. They're still



1 here, but they're not here. So there have been a lot of
2 changes since 2001.

3 THE COURT: And I agree you may or may not have had
4 a valid position, but at the time you wrote this letter, it
5 was a matter of huge acrimonious disagreement.

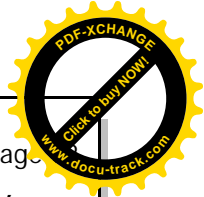
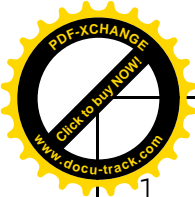
6 MR. HAVILAND: That's fair.

7 THE COURT: So it was a little misleading to this
8 court, the New Jersey court, and I knew what was going on.

9 MR. HAVILAND: But there was no intent, your Honor,
10 to deceive. By having it vetted, by having Judge Bassler
11 coordinate with your Honor to speak, we wanted this to be
12 open, discussed.

13 One of the problems, if I can go back to something
14 that I think is not a good thing to discuss is Lupron. We
15 didn't do that early on. We didn't have Judge Visalli from
16 Cape May County speak to Judge Stearns and Judge Brewster
17 (Phon), the special master, speak to Judge Stearns early. In
18 the summer of, I think, 2004, Judge Stearns was considering
19 an injunction against the state court case a month from
20 trial, and it was only at that point in time that the
21 dialogue began, that the coordination began, that the
22 resolution finally came a year later. That's why it's
23 productive to have it, your Honor, and I encourage that in
24 all of our cases.

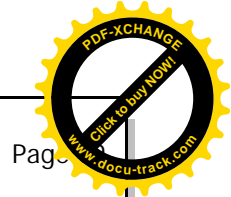
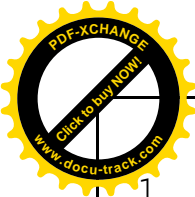
25 THE COURT: And I think that is a good idea, and



1 I've done it in the Neurontin cases. And I think over time,
2 I hope when I transfer some of these cases back, I'll be
3 talking to the judges in those federal district courts, and
4 when I start remanding cases to state courts, I'll talk to
5 those state courts. I mean, I'm trying to get to stage two
6 of this big massive case. The federal government is starting
7 to unleash a bunch of qui tam actions. I mean, it's a huge
8 case, as you know, and I'll need to coordinate with the state
9 courts.

10 However, my basic obligation is to oversee this
11 case, and I am at this point troubled on the co-lead counsel
12 thing. And although there's been nothing pending in front of
13 me, I need your thoughts on what your position is and what's
14 in the best interest of the class. If you want to file
15 something, Mr. Haviland, you should probably do this within a
16 week. If anyone here wants to file something, you can.
17 Regardless of how I rule on it, I order that you dismiss any
18 of the cases that conflict with this one.

19 Now, you may have to do something -- I'm pointing
20 to the Baxter folks -- may have to do something with respect
21 to that case. I don't know. You do your own thing. I can't
22 have jurisdiction at this point over the rest of the case
23 that doesn't overlap with mine. I mean, you might be better
24 off there. I mean, I'm just swamped with this case, so you
25 might get better attention from what seems like a lovely and



1 experienced, probably more experienced than I am, federal
2 judge who's doing this down in New Jersey for the state
3 court. So that's your call, but I need to take care of this
4 case.

5 MR. SOBOL: The July 27 letter that you mentioned,
6 it's a letter -- I just want to make sure -- we're going to
7 try and get copies because we'll need to read it.

8 THE COURT: July 27 to the Honorable William G.
9 Bassler from Donald D. Haviland, Jr., cc: John Keefe, Jr.,
10 Andrew Jackson, Esq., Michael Rosenberg. I'll just leave it
11 here, and you can underline it.

12 MR. SOBOL: Well, Mr. Haviland has indicated that
13 he'll get us a copy now that I know exactly which letter it
14 is. Thank you.

15 THE COURT: In any event, so something within a
16 week?

17 MR. JACKSON: Your Honor, to the extent that
18 they're going to file something, I think we'd like to look at
19 it first --

20 THE COURT: Fair enough.

21 MR. JACKSON: -- before the defendants either here
22 or in New Jersey or elsewhere. I mean, we'd like to see it,
23 and then we'll decide whether we need to respond.

24 THE COURT: To the extent the case does stay in
25 New Jersey, though, Judge Bassler and I are talking. As you

1 know, Judge Bowler is the coordinating magistrate judge on
2 this case -- I gave him her phone number -- to the extent
3 there are outstanding discovery issues that could be
4 coordinated between the two actions, and I am happy to help
5 that out. That having been said, as soon as we stay it with
6 respect to all the cases that are here, I'm not sure that
7 there will be a lot of overlap anymore.

8 MR. HAVILAND: Your Honor, can I show you the case
9 management order that's under consideration just so you can
10 see that we've already got that built in?

11 THE COURT: Okay. I think that's it, right?

12 MR. SOBOL: Thank you, your Honor.

13 THE CLERK: Court is in recess.

14 (Adjourned, 10:45 a.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court
Reporter, do hereby certify that the foregoing transcript,
Pages 1 through 30 inclusive, was recorded by me
stenographically at the time and place aforesaid in Civil
Action No. 01-12257-PBS, MDL No. 1456, In re: Pharmaceutical
Industry Average Wholesale Price Litigation, and thereafter
by me reduced to typewriting and is a true and accurate
record of the proceedings.

In witness whereof I have hereunto set my hand this
13th day of September, 2007.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL FEDERAL COURT REPORTER